

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA,)
4 Plaintiff,) No. 3:12-cr-659-MO-1
5 v.)
6 REAZ QADIR KHAN,) September 11, 2014
7 Defendant.) Portland, Oregon
8 _____)

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15 **Oral Argument**

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MICHAEL W. MOSMAN

18 UNITED STATES DISTRICT COURT JUDGE
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1 (P R O C E E D I N G S)

2 MR. KNIGHT: Good afternoon, Your Honor. We're
3 present in the matter of United States v. Reaz Khan. This
4 is Case No. 12-cr-00659. Ethan Knight and Charles Gorder
5 appearing on behalf of the government. The defendant is
6 present, out of custody, with counsel Jack Ransom and Amy
7 Baggio. And we're present today, Your Honor, on two of
8 defendant's motions: a motion to compel discovery and a
9 motion to compel notice of search and seizure authority.

10 Your Honor, for the Court's information, I'll be
11 handling argument related to the motion to compel discovery
12 and Mr. Gorder will be handling argument relating to the
13 motion to compel notice.

14 THE COURT: Thank you.

15 Let's start with the latter one. And so it's a
16 defense motion. I've reviewed what both sides have
17 submitted. Is there anything you wish to add to what you've
18 submitted in writing on that motion?

19 MS. BAGGIO: Your Honor, I will be arguing the
20 motion to compel notice of the search and seizure for the
21 defense. And I want to make sure I understood that's the
22 one you wanted to --

23 THE COURT: That's the one we're going to do
24 first, yes.

25 MS. BAGGIO: Thank you, Your Honor.

1 Just briefly, Your Honor, I believe that it's
2 important for us to start out with the facts to which -- or
3 law on which the parties agree. And first and foremost, I
4 believe that the parties agree that FISA does not change the
5 Government's discovery obligations. The question then
6 becomes what are the Government's discovery obligations.
7 And I believe the parties still agree that the Government's
8 discovery obligations come down to Rule 12 and Rule 16 in
9 the Federal Rules of Criminal Procedure, *Brady v. Maryland*,
10 the Jencks Act, and then whatever is constitutionally
11 required.

12 And it's that last piece, Your Honor, that I think
13 that we would have to admit there is some gray area in terms
14 of what is constitutionally required.

15 THE COURT: Can I interrupt for just a moment and
16 maybe toss in a couple of the thoughts I have about it and
17 see where that takes you in your argument.

18 So not only the parties agree, but I agree that
19 those are the governing standards here. And it seems to me
20 that part of why there is this agreement about what FISA
21 does or doesn't require with the ability to challenge the
22 searches and seizures that led to evidence -- which is
23 really what we're talking about here -- is that at some
24 level, FISA has to some degree dropped out of the picture if
25 you are at that point. At some level the government has

1 declassified something and given it to the defense, and now
2 the defense wants to challenge the legitimacy of the
3 acquisition of the evidence. If they don't declassify
4 something and you don't know about it, then we're not having
5 that motion to suppress because you don't have it.

6 And so at that point, that's what you're talking
7 about. You have received a number of materials. You want
8 to challenge the legitimacy of the searches or seizures that
9 led to them coming to you, and that is, once the step I've
10 just described has taken place, that is largely governed by
11 the best we can do duplicating what's done in a regular
12 criminal case, with some, you know, caveats in place, I
13 suppose.

14 So if I understand your position correctly, you
15 have evidence that you want to -- you want to evaluate, at a
16 minimum, whether you can move to suppress it, and you
17 believe that you need to know more than you now know in
18 order to do that, right?

19 MS. BAGGIO: That's correct.

20 THE COURT: And you have, if I understand this
21 correctly from your pleadings and from the government's
22 brief in response here, you have two kinds of evidence: you
23 have evidence that's been declassified and come to you; and
24 at least the government seems to suggest that you have
25 figured out that some of the evidence came just through

1 standard criminal investigative procedures like, say,
2 physical stakeouts or something like that.

3 Is that a fair description of what's gone on so
4 far for you?

5 MS. BAGGIO: Yes, Your Honor, except I would add
6 to the last point, we may know that a Rule 41 search warrant
7 was used to obtain certain evidence but we might not know
8 all of the evidence, the source of all the evidence on which
9 the search warrant application was based. So, in that
10 sense, while we may have some definitive answers as to some
11 of the evidence, we still may not know where it originally
12 came from.

13 THE COURT: Right. So the crux of your issue is
14 that you have a pile of evidence that maybe is in two
15 stacks, the two I've just described, and you may have some
16 rough ideas, but you certainly aren't sure if you can
17 identify by what authority any particular piece of evidence
18 was acquired?

19 MS. BAGGIO: That's correct, Your Honor.

20 THE COURT: And your contention is that there's
21 nothing about FISA or related national security law that
22 changes the fundamental equation that as to evidence that
23 you assume is going to be used against you because it's been
24 produced, you should have whatever -- you should have enough
25 to file a meaningful motion to suppress.

1 MS. BAGGIO: That's correct, Your Honor.

2 THE COURT: And the Government suggests, I think,
3 two things about that. One is that you -- well, maybe
4 three. One is that you sort of have a rough idea about this
5 dividing line between what you've received that's been
6 declassified and what you've received that just came through
7 nonclassified channels originally. And I think I have your
8 answer on that. Maybe a rough idea, but nothing very
9 specific.

10 MS. BAGGIO: Correct.

11 THE COURT: So that's one thought.

12 The other I'm not sure I totally understand, and
13 I'll ask the government more about this in a minute, but I
14 want to see if it is accurate as far as you know.

15 The government suggests that in conversations with
16 you -- and I'm now looking at page 5 of the government's
17 response to your motion. I'm not sure I get this. I'm
18 starting with you because you're the moving party and maybe
19 you can help me here.

20 The government suggests that in conversations with
21 you, something about those conversations has informed you
22 that if you're going to challenge the authorities by which
23 the declassified evidence came -- came to be seized, if we
24 will, that that's going to be FISA Titles 1, 3 and 7.

25 Tell me more about that from your perspective.

1 MS. BAGGIO: Your Honor, from my perspective,
2 informing us that they used Titles 1, 3 and 7 of FISA is
3 insufficiently specific.

4 THE COURT: Let me just start with that. Is that
5 what's happened? Is that what's happened, first of all?
6 Have you been informed that the sources you ought to be
7 thinking about challenging are 1, 3 and 7?

8 MS. BAGGIO: By reading this memo, Your Honor. I
9 don't recall specific other conversations, other than after
10 this was filed, in talking with the government about what we
11 wanted. But I have no more specific information than what
12 appears here.

13 THE COURT: Let's assume that means what it says,
14 and that that's the road you ought to take. Once again,
15 just help me if this is where you are. It seems like you
16 are in a position to challenge the overarching
17 constitutionality of those authorities, right? You spoke
18 last time we were together about how you might have to
19 challenge the constitutionality of every possible
20 acquisition authority there might be, and if this is a
21 limitation that's meaningful, then as to just what I'll
22 think of as systemic challenges to authorities, you can
23 limit yourself and you can raise broad Constitution-based
24 challenges to the legitimacy of those authorities. Is that
25 fair?

1 MS. BAGGIO: We could raise facial challenges --

2 THE COURT: That's the word I was thinking of.

3 MS. BAGGIO: -- to those three titles.

4 However, the problem is that even within those
5 titles, there are so many different ways of doing so many
6 different things that it's our position that that's not
7 sufficiently specific.

8 And the second problem that we have, Your Honor,
9 is because of -- based on the discovery provided, it
10 suggests that this investigation went on for years and
11 years. We're not certain which versions of these titles
12 were used.

13 THE COURT: All right.

14 MS. BAGGIO: And --

15 THE COURT: So you have some problems even making
16 a facial challenge to those authorities.

17 And then the second thing the government says here
18 is that -- I guess a suggestion that these are the relevant
19 authorities, and that if you prevailed as to those
20 authorities, it would be dispositive of the case. I guess
21 that's a way of saying that these are the authorities that
22 matter in this case.

23 And then, second, the suggestion that this --
24 well, it's not even a suggestion, I guess. There's the idea
25 that this allows you to seek rulings against the government

1 on the constitutionality of or the government's compliance
2 with those provisions.

3 So I guess my first take was maybe yes as to the
4 constitutionality of it, but my impression is that you don't
5 think or don't have what you would need to challenge the
6 government's compliance with any specific authority. Is
7 that fair?

8 MS. BAGGIO: That is fair, both as to as-applied
9 constitutional challenges, as well as any statutory
10 violations that might have taken place.

11 THE COURT: So whether the government sort of
12 followed the protocol set out in those authorities for
13 obtaining the evidence it got, you just don't know?

14 MS. BAGGIO: That's correct.

15 THE COURT: And you think the authorities you
16 cited to me in your briefing entitle you to know?

17 MS. BAGGIO: That's correct.

18 THE COURT: And that's kind of the crux of this
19 issue, isn't it?

20 MS. BAGGIO: And may I add one other?

21 THE COURT: Absolutely. I didn't mean to -- I'm
22 just telling you what I thought your argument was, and now
23 you can help me with what I missed.

24 MS. BAGGIO: Thank you, Your Honor.

25 One other point that really came out to me in the

1 government's briefing is footnote 2 on page 4, in which they
2 are saying they don't intend to rely on the authority of the
3 Terrorist Surveillance Program authorization of use of
4 military force or president's Article II power.

5 I understand from a driveby perspective it kind of
6 supports what the Court just referred to on page 5 if we're
7 just dealing with these three subchapters of FISA -- or
8 titles of FISA. But one of the problems that I'm having
9 with this, Your Honor, is it's unclear to me how the
10 government is interpreting seizures and constitutionally
11 significant events, because based on some of the publicly
12 disclosed government surveillance practices, in combination
13 with some of the government's statements, for instance,
14 before the Privacy and Civil Liberties Oversight Board, we
15 have -- we're getting this information that the government
16 may take the position that it could conduct a bulk
17 surveillance of telephone metadata or Internet metadata or
18 perhaps even Internet communications under EO 12333 or under
19 the FISA Amendments Act, but in some of the different places
20 in which the government has made statements about this,
21 they've taken the position that, well, that initial seizure
22 isn't really a seizure, and in fact it's only when it's
23 later sorted and certain information is pulled out that
24 that's a seizure.

25 In another context, the government has taken the

1 position that later searches of a collected vat of
2 information, later searches of that even years later don't
3 constitute constitutionally significant events.

4 So my concern with the government's representation
5 is I'm not sure how they are reading search and seizure law
6 to say the only thing at issue here are Titles 1, 3 and 7 of
7 FISA. So that is an additional concern, again based on both
8 the publicly available information and the discovery in this
9 case, which although the orders -- the orders seem to have
10 come about around 2009, based on the seized communications,
11 the email communications go back to 2005. And so there
12 becomes a question in our minds under what authority were
13 those seized back in 2005.

14 Does that concern make sense, Your Honor?

15 THE COURT: Yes.

16 MS. BAGGIO: And I think one of the other things
17 that I -- that we agree -- and this seems like we're all
18 consistent on this. On page 3 of its response, the
19 government cites a Federal Rules Decision case to say that
20 the government's obligations are satisfied when it has made
21 disclosures that sufficiently allow defendants to make
22 informed decisions whether to file one or more motions to
23 suppress.

24 This is what we're struggling with, Your Honor.
25 And if we take away the FISA overlay for a moment and

1 consider this a regular criminal case -- and Mr. Khan is
2 charged not with material support but with a complex
3 financial fraud -- and imagine that the government gives me
4 40,000 pages of information and they say, okay, here's our
5 evidence, here's your charge, and we use Title 18, Chapters
6 119 and 121. And I know by reading those chapters that that
7 could have been a wiretap, that could have been ordered
8 under the Stored Communications Act, that could have been
9 the Congress's Assistance to Law Enforcement Act. There's
10 all these different legal mechanisms within that larger
11 umbrella.

12 Now, I understand the point that you made earlier,
13 Your Honor, is they've narrowed that somewhat if we're going
14 to hold them to Title 1, 3 and 7, but even within the Title
15 1, 3 and 7, there's so many different ways to do things that
16 I submit I can't be effective and I can't evaluate whether
17 or not -- make an informed choice about whether I should
18 file a motion to suppress evidence when I'm not sure which
19 mechanisms were used.

20 And then if we add the FISA overlay, Your Honor,
21 back into it, another point I just wanted to highlight --

22 THE COURT: Let me pause you there for a moment.
23 I take seriously your argument that you don't feel that you
24 had adequate information to know whether, or if the answer
25 is yes, then how to file a facial challenge to the

1 authorities.

2 I guess I thought your more fundamental argument
3 was -- Let me back up. So that's an argument that you've
4 been given some information towards what you need but not
5 enough.

6 I thought your more fundamental argument was the
7 second one, which is I was under the impression you have
8 essentially no information that would tell you whether the
9 government complied with the methods set out for obtaining
10 it or not. Am I wrong about that?

11 MS. BAGGIO: No, you are correct. That is
12 correct.

13 THE COURT: The first argument is you've been
14 given something but not enough; but isn't the second
15 argument that you have, in terms of deciding whether to
16 challenge evidence based on the government's compliance with
17 the authorities, you wouldn't know the first thing about
18 whether to file or when to file, would you?

19 MS. BAGGIO: That is true, but I also recognize
20 that, as outlined in the government's response, there are
21 mechanisms for that to happen in a special way in a FISA
22 case, but I don't even know which sets of statutes or which
23 subsections or which definitions to look at so that I can
24 draw a road map for Your Honor to go through and look at
25 them. That's the kind of narrowing that we're hoping for.

1 THE COURT: And then you said -- your analogy was
2 to a complex financial fraud case, and then you said if you
3 add the FISA overlay, then what?

4 MS. BAGGIO: Thank you, Your Honor.

5 If you add the FISA overlay, you have not only
6 Rules 12, 16 and the federal constitutional requirements and
7 considerations, but we also have the express statutory right
8 for this defendant to challenge in this proceeding the
9 lawfulness of the seizure and whether the seizure occurred
10 in conformance with the application and order.

11 And, Your Honor, my position is that that
12 statutory right to say that this is an unlawful seizure is
13 more than us being able to do a driveby "the FISA statute is
14 unconstitutional on its face." To interpret that statutory
15 right under -- it's under 1806(e) for the electronic motions
16 to suppress and 1825(f) for the physical searches. For that
17 statutory right to have any meaning, then we need to be
18 given sufficient information to be able to challenge it.

19 And it's our position, Your Honor, that only with
20 more detailed disclosures, at a minimum, of the statutes,
21 subsections and versions used, but also that it needs to be
22 tied back to at least classes of evidence, because that way
23 we can more fully understand the picture. I can make an
24 informed decision about whether to file a motion to suppress
25 and so that we can understand the exploitation analysis,

1 because so many of these investigative methods allow
2 retroactive information to be produced that I can't even
3 possibly know when things happened, whether an order was
4 issued in 2005 to get email or whether that happened in 2012
5 and was able to retroactively get email.

6 And therefore, Your Honor, it's our position that
7 not only does a regular criminal case require the type of
8 notice requested in other pleadings, but FISA further
9 recognizes the necessity of us being able to exercise that
10 statutory right to move to suppress evidence.

11 THE COURT: Did you just say that you needed
12 further identification of the authorities in order to do the
13 exploitation analysis?

14 MS. BAGGIO: And tie it back to individual pieces
15 of evidence.

16 THE COURT: I didn't know what you mean by those
17 two words.

18 MS. BAGGIO: Yes, Your Honor.

19 Well, if, for instance, if we're looking at, for
20 example, a search warrant application, and the search
21 warrant application describes an investigation that took
22 place in 2005, either to a certain investigative process in
23 2006 and 2007, and then I can know that if a bad search
24 happened in 2006, that that would then have a domino effect,
25 and I can make a *Wong Sun* fruit-of-the-poisonous-tree

1 argument as to the government exploited that illegality.

2 THE COURT: Seems to me that the derivative use
3 would be by exploitation.

4 MS. BAGGIO: Yes, Your Honor. I'm sorry.

5 THE COURT: It's a perfectly good word, I just
6 didn't know what you meant by it. I guess that makes it not
7 a perfectly good word.

8 One last question, then. You -- let me just ask
9 what position would you be in if there were no further or --
10 no more linkage of authorities to pieces of evidence but a
11 more specific identification of authorities with regard to
12 your facial challenge? Why would you be able to make a
13 facial challenge if you knew exactly what authorities had
14 been used without knowing precisely what pieces of evidence
15 came from the use of those authorities?

16 MS. BAGGIO: So long as that disclosure included
17 specific enough reference to a section or subsection, and
18 the version, Your Honor, I think based on having that
19 information, I could do a facial challenge. I may still be
20 unable to conduct an as-applied challenge or to examine
21 whether they complied with the statute.

22 THE COURT: I was just sticking with the facial
23 challenge.

24 You could get there probably, and you might even
25 have, depending on the nature of the disclosed specific

1 authority, you might even have a pretty good idea what
2 evidence came from it?

3 MS. BAGGIO: That is correct, Your Honor.

4 THE COURT: All right. Thank you.

5 Mr. Gorder, let's start with this concept of
6 what's needed to make an adequate facial challenge, and then
7 we'll talk about what's needed to make an adequate specific
8 or as-applied challenge to the government's compliance.

9 MR. GORDER: Very well, Your Honor.

10 You know, we are cognizant and understand the
11 dilemma that defense counsel is in in cases like this. To
12 use her analogy, if this was a fraud case and we gave them
13 records that said it came from criminal wiretaps and search
14 warrants, she would get the affidavits in support of the
15 wiretap orders, the copies of the orders, and be able to,
16 you know, basically figure out her probable cause argument,
17 if she desired to make that.

18 That's not the situation that Congress set up with
19 regard to FISA. The situation is kind of in the reverse.
20 So we have gone about as far as we can go with regard to
21 classified techniques of acquiring foreign intelligence.

22 THE COURT: That's, I think, a little -- relevant
23 to both points I'm interested in, runs more towards the
24 as-applied challenge. So the idea, at least, that we're
25 left with is that -- without putting words in your

1 opponent's mouth -- I think there's a sort of a minimum that
2 is sought by way of identifying the actual authorities
3 relied on in this case, such that just a challenge to the
4 constitutionality of those authorities could be made. So I
5 suppose that could be made today with the disclosures you've
6 made.

7 Actually, let me back up a little bit. Am I
8 reading your brief correctly that in some way the defense
9 has been told which authorities they ought to think about
10 challenging here, maybe informally?

11 MR. GORDER: Well, both formally and informally,
12 Your Honor. The formal way was the notices that we filed
13 with the Court, which indicates that the government intends
14 to use evidence derived from FISA Title I and FISA Title II
15 and FISA Title VII.

16 THE COURT: All right.

17 MR. GORDER: And so basically you've got
18 electronic surveillance under FISA, physical search under
19 FISA, and the FISA Amendment Act changes that occurred in
20 2008.

21 And I think to make a general facial challenge to
22 those statutes, they have what the FISA statute says -- or
23 what Congress says is required to make those kinds of facial
24 challenges. I mean --

25 THE COURT: There would have to be -- I mean,

1 there might be truly overarching arguments made to the FISA
2 and the FISA Amendments Act in their entirety, but to
3 challenge the specific methodologies authorized by either of
4 those acts today, if Ms. Baggio wanted to do that, she'd
5 have to challenge all of them contained in those three
6 chapters or subsections, right?

7 MR. GORDER: Yes. But --

8 THE COURT: Why is that better than the only way
9 permitted under law, more detailed identification of what
10 was relied on here?

11 MR. GORDER: Well, I'm not sure I understand what
12 more detail the defense would need to make the facial
13 argument. I mean, the electronic --

14 THE COURT: They know there was an electronic
15 surveillance but they don't know what kind of electronic
16 surveillance.

17 MR. GORDER: Right. But the statute that
18 authorizes it, all electronic surveillance is the same. If
19 you want to make a constitutional challenge to the
20 government's ability to do FISA electronic surveillance, you
21 look at Title 1 of FISA. I mean, the statute doesn't make a
22 difference between different kinds of electronic
23 surveillance.

24 THE COURT: I suppose the idea is that some
25 methods of engaging in electronic surveillance are on weaker

1 constitutional footing than others. Maybe going after
2 stored emails is weaker in some way -- I haven't thought
3 about this, but weaker in some way than going after
4 something else, so the idea being you might not have just
5 one generic constitutional argument. You might have better
6 ones for some methods and weaker ones for other.

7 MR. GORDER: Well, I think, Your Honor -- and
8 again, I don't intend to say that this is an easy task, but
9 that is what FISA requires.

10 THE COURT: Well, that's your position, is that
11 more detailed identification than what you've done so far is
12 beyond what Congress contemplated by way of notice?

13 MR. GORDER: Correct.

14 THE COURT: And what's your authority for that,
15 the authority that would say that identifying not just the
16 overarching authority but the specific methodologies used is
17 not permitted here?

18 MR. GORDER: Well, I think, Your Honor, the
19 authority that we have are the cases that upheld the
20 in-camera ex parte process that is used to challenge FISA
21 and to get into the as-applied analysis in any particular
22 case.

23 Second, as we mentioned in our brief, I mean,
24 Congress did require more specific notices in certain cases
25 but not in the overall just general electronic surveillance

1 area or physical search area, but they did make an exception
2 for certain kinds of notice in certain circumstances. So --

3 THE COURT: All right. Let's turn, then, to the
4 idea that -- I guess only -- again, I'm not trying to make
5 you say something you didn't say, but sort of hinted at in
6 your brief is the idea that a person ought to be able to
7 challenge not only the constitutionality of searches but the
8 government's compliance with the authorities that allow for
9 those searches.

10 Sitting here today, does Ms. Baggio have what she
11 needs to challenge the government's compliance? Your
12 analogy to financial fraud was she would be able to know
13 whether there was PC to challenge it.

14 MR. GORDER: The answer to that question is no,
15 she does not. The applications that went to the FISA board
16 are classified, she does not have access to those, and the
17 process that Congress has set up and that the courts have
18 upheld as constitutional is should she file a motion to
19 suppress, which she undoubtedly will next Monday, Your
20 Honor, we will be preparing an ex parte in-camera classified
21 brief for you to examine that establishes, in our position,
22 that the applications were proper, that the court orders
23 were authorized by law, and that the government complied
24 with the requirements of the various orders.

25 The procedure that Congress has set up and that

1 the Courts have upheld is that you will examine those
2 yourself in camera, and only if you find it necessary to
3 bring Ms. Baggio into the equation to make a decision, which
4 you -- you know, we don't think you will need in this case,
5 as hasn't happened in any other FISA case to date.

6 But that is the way that the as-applied and
7 compliance mechanism is examined by the courts in this case,
8 because the details of FISA surveillance -- physical search,
9 et cetera -- are classified. We're not allowed to publicly
10 discuss what the target of a FISA is, the details of the
11 time period, court orders and that sort of thing. So that's
12 just the way Congress has set it up, and the courts to date
13 have upheld it as an appropriate way to balance the national
14 security issues that are contained in FISA applications and
15 orders and the criminal process that, you know, we're
16 engaged in today.

17 THE COURT: So if I agreed with you, then going
18 forward, what would happen is that for facial challenges,
19 Ms. Baggio would be able to make a very sort of programmatic
20 or overarching challenge to the constitutionality of FISA
21 and the FAA, at a minimum, and to the degree that she
22 thought she had particular arguments that got at some but
23 not all of the methodologies used, she'd have to just make
24 all of those arguments, not being sure that those
25 methodologies were used in this case, challenge the

1 constitutional of them.

2 And then as to the idea that the government failed
3 to follow or failed to comply with the requirements for
4 using those authorities without knowing one way or the other
5 whether that was the case or not, or even if she had a good
6 argument or not, she'd just have to move to suppress for
7 failure, for example, failure of the government to show PC
8 to the FISC, and you'd respond ex parte in camera?

9 MR. GORDER: That's correct, Your Honor.

10 And she could certainly use whatever discovery she
11 has to date to supplement those arguments. I mean, I have
12 seen in my own cases defense counsel take the discovery, and
13 based on discovery make an argument that their client
14 couldn't have been found to be an agent of a foreign power,
15 for example, or somebody else couldn't have been found to be
16 an agent of a foreign power.

17 But, again, we're cognizant of the difficulty that
18 she is in in trying to make those arguments because she
19 doesn't have the supporting documents, but that's just the
20 process that's been set up by Congress and has been found
21 constitutional.

22 THE COURT: And then if I could refer to page 4
23 for just a moment of your brief, I think you're asserting or
24 at least suggesting that enough discovery has been given
25 that the defense either can or has figured out which pieces

1 of evidence it's received have just come from non-FISA
2 means. Is that right?

3 MR. GORDER: Well --

4 THE COURT: I'm not sure I understood what you
5 were saying there.

6 MR. GORDER: I think what we had said was they
7 have enough information to make a determination,
8 particularly given the notice that we have provided as to
9 what parts of FISA are important to litigate in this case,
10 and in a general sense can figure out most of the time, for
11 example, an audio call that was recorded, where it came
12 from.

13 THE COURT: What do you mean by saying that they
14 have -- leaving FISA aside, they have successfully divined
15 from discovery that evidence may also have been collected
16 pursuant to grand jury, physical surveillance, witness
17 interviews, border searches?

18 MR. GORDER: Right. I was referencing the chart
19 that Ms. Baggio has in her pleading where she goes through a
20 number of those items.

21 And then obviously, you know, an FBI 302, for
22 example --

23 THE COURT: Of a witness interview?

24 MR. GORDER: -- of a witness interview makes it
25 clear that it was a witness interview.

1 THE COURT: So FISA just wouldn't apply and she
2 could challenge it by any of the standard methods that were
3 available?

4 MR. GORDER: Correct.

5 THE COURT: All right. Thank you.

6 Ms. Baggio.

7 MS. BAGGIO: Thank you, Your Honor.

8 Three quick points in rebuttal. First of all, the
9 government has said that we can challenge the statute's
10 constitutionality by just looking at the statute, and if
11 it's an electronic seizure, we challenge the FISA statute
12 for electronic seizure.

13 I'm trying, and it's really, really difficult,
14 Your Honor. If we start with a good definitional section --
15 for example, Mr. Gorder raised the example of, well, some
16 attorney tried to argue whether or not his client could have
17 been an agent of a foreign power. I think there are about
18 ten different definitions of how somebody can be an agent of
19 a foreign power. There are seven different definitions of
20 how a person can actually be a foreign power directly. And
21 I'm not even sure where we fit into any of these pieces. So
22 even when I was preparing for argument, I was trying to do a
23 visual of how all these ways could fit together, one piece
24 of evidence, all the different ways by which the government
25 might have obtained it, and I couldn't do it, it was just so

1 complicated.

2 So if we look at just, for example, the chapter on
3 electronic surveillance, there is a whole statutory scheme
4 if the electronic surveillance is seized without an order.
5 There's a whole different statutory scheme if the electronic
6 surveillance is obtained pursuant to an order. So even just
7 narrowing by half, it would be of great assistance to the
8 defense, but we still have the problem of so many
9 definitions that come into play, and again, the problem of
10 different versions being in effect at different times.

11 The same thing applies to the physical searches
12 chapter, where they have a whole section that explains how
13 physical searches can be done by presidential authorization
14 and all the complicated processes associated with that
15 versus how it can happen pursuant to a court order.

16 So that is what we're struggling with here, Your
17 Honor, and I believe therefore that simple references to
18 Title 1, 3 and 7 is insufficient.

19 The government also mentioned, well, there is an
20 audio call, so clearly it's obtained by FISA. Well, we
21 don't know if it's FISA or if it's the FISA Amendments Act.

22 And so those types of pieces of information will
23 allow me to do my job but also to be able to focus the
24 Court's attention on the different pieces of FISA that are
25 relevant and not waste anybody's time on what's not

1 relevant.

2 The last point that I just wanted to mention, Your
3 Honor, is the government does make the argument that other
4 parts of FISA require more specific disclosures. And I
5 would like to just respond to that by saying if we look at
6 each of those other FISA provisions that require more
7 specific notice of an application, of a date of an order or
8 of the information obtained I think are some of the things
9 that those more specific notice provisions require, all of
10 those involve people who aren't charged with anything. And
11 I think that is absolutely the difference here, that
12 Congress looked at someone who is charged in a criminal
13 case, and when they're charged in a criminal case, the
14 notice provisions come into play, the statutory right to
15 move to suppress moves into play, as do the Rules of
16 Criminal Procedure and the constitutional protections. None
17 of that applies in the examples cited by the government.

18 THE COURT: One of Mr. Gorder's arguments is that
19 we're not writing on a blank slate here; that the Ninth
20 Circuit, at a minimum, and other courts have spoken on
21 what's allowed and not allowed. To what degree do you view
22 what you're asking for as either open or foreclosed by Ninth
23 Circuit authority? In other words, is there any theory
24 under which your argument is simply suggesting that existing
25 authorities have it wrong and I ought to reconsider versus

1 just open field where no authority prohibits what you're
2 asking for?

3 MS. BAGGIO: I believe we're in the latter
4 category, Your Honor, not the former. I'm aware of no one
5 in any other case that has made this type of request, not
6 for access to the applications and orders or challenging
7 that process set out in FISA. This is different, Your
8 Honor. We're asking just for more specific notice of the
9 authorities that were used and the versions. We are also
10 asking for it to be tied to at least classes of evidence.
11 I'm not asking to read the application, I'm not asking to
12 look at the order. I just want the universe of
13 possibilities to be reduced dramatically to just the ones
14 that are relevant to this case.

15 THE COURT: All right. And so I think I
16 understand your position on challenging compliance, that you
17 can do a better job of it if you -- if the field is narrowed
18 somewhat for the authorities that had to be complied with.
19 But you're not asking today for the underlying documents in
20 order to see whether the affiant stated probable cause to
21 the FISC?

22 MS. BAGGIO: Precisely, Your Honor. And if we
23 know that we're in the section that allows recording of a
24 phone call without a court order, then I would be setting
25 out for the Court these are the processes, now that I know

1 we're in this one and not the court-ordered section of FISA.

2 THE COURT: Thank you.

3 MS. BAGGIO: Thank you.

4 THE COURT: Let's turn to the other motion. And I
5 guess, then, Mr. Knight and Mr. Ransom, you're handling
6 those; is that right?

7 MR. RANSOM: That's correct, Your Honor.

8 THE COURT: So once again I've reviewed what you
9 submitted and you've had a chance now to review the
10 government's response. Anything you wish to add to what you
11 said in writing?

12 MR. RANSOM: Yes.

13 In regard to the statements of the defendant, Your
14 Honor, the government's position is it has provided all
15 statements that are relevant and material. It is our
16 position that the government has not.

17 I'd like to reference the emails themselves which
18 have been obtained through either FISA or the FISA
19 amendment. We assume there are a significant cache of
20 documents that are held, the metadata, and that these are
21 reviewed pursuant to keywords that are provided. Let's say
22 in this case the keywords are "Reaz Khan," and of those, a
23 thousand documents appear.

24 And then there is a filter, and in the first
25 filter -- and this is all supposition based on what I have

1 read. The first filter, let's say it's reduced to 800
2 emails. And then there is a second filter, and let's say
3 the second filter is reduced to 500 emails. Those 500
4 emails are provided to us, but we are not provided the other
5 500 emails. And those are all statements of the defendant.

6 And Rule 16(a)(1)(E)(iii) provides, "Defendant is
7 entitled to documents which were obtained from or belonged
8 to the defendant."

9 It is our position that all of those emails were
10 obtained from or belonged to the defendant, and we are
11 entitled to all of those emails. All of the emails obtained
12 through FISA or FAA fit that criteria.

13 THE COURT: Now, you started out saying that the
14 government asserts it has given every one of those that are
15 relevant or material. That's incorrect. I guess I hear you
16 really saying that the governing standard isn't whether
17 they're relevant and material but rather the standard you
18 read out of Rule 16, which as I understand your position
19 doesn't require you to show relevance or materiality, just
20 requires you to show that it belonged to your client.

21 MR. RANSOM: That's our first position, yes.

22 THE COURT: So you don't really feel obligated to
23 show the relevance and the materiality of the undisclosed
24 statements of your client, you think you're entitled to them
25 just under Rule 16, and you get to look at whether they're

1 relevant or not, but any statement that belonged to him you
2 should get. Is that your position?

3 MR. RANSOM: That's our first position, yes.

4 THE COURT: All right. So when you say "first," I
5 assume you have a second position. What is that?

6 MR. RANSOM: Your Honor, our second position is
7 what is relevant. And there's no definition in Rule 16.
8 But Rule 401 provides it would have a tendency to make a
9 fact more or less probable than it would be without the
10 evidence and would have a consequence in determining the
11 action.

12 It is further our position that all of those are
13 relevant because they do and will have a tendency to make a
14 fact more or less probable.

15 Now, let me give you an example. Let's suppose
16 hypothetically that we wanted to demonstrate that the state
17 of mind of Mr. Khan was such that he never envisioned in any
18 fashion by anybody under any circumstances a violent jihad
19 or murder of Muslims. And what way we would show that state
20 of mind would be what he had written over the course of
21 years during which all of these emails were captured. So,
22 in our opinion, those are all relevant and material under
23 that hypothetical to our defense.

24 Now, I don't want to set forward precisely what
25 our defenses may or may not be, but I just use that

1 hypothetical as an example. And if we go back to what I was
2 talking about in regard to the filtering, who is it that
3 says that an FBI agent who has a thousand emails and filters
4 those down to 800 has any idea what is relevant to
5 Mr. Khan's defense in which he hasn't even been charged yet?

6 THE COURT: Under your theory of relevance, they'd
7 all be relevant, wouldn't they?

8 MR. RANSOM: Yes, they would be.

9 THE COURT: If there are 10,000 emails, and 500
10 have been disclosed to you as inculpatory, wouldn't your
11 theory be the more the better in terms of undisclosed
12 emails? Because you'd like to show that, you know, the
13 500,000 times he wrote emails about his kids and soccer and,
14 you know, Portland Water Bureau or whatever else might be
15 there. That's the idea, isn't it?

16 MR. RANSOM: Something like that, yes.

17 THE COURT: All right.

18 Let me just ask, I suppose there's another avenue
19 for doing that, right? I mean, your -- you have available
20 through nonclassified means in a variety of ways the story
21 that your client, you know, wrote a number of emails, and
22 almost by definition the ones you've received that have been
23 declassified are the only potentially inculpatory ones.
24 Can't you advance that theory at least in your hypothetical
25 and a lot of other ways?

1 MR. RANSOM: I'm not sure I understood the
2 question.

3 THE COURT: Well, one simple way involves your
4 client testifying, which I realize is problematic. I mean,
5 your client can say, "Well, they've given me 500 of my
6 emails, but I was on the computer all the time. I must have
7 written 100,000 emails over that time and they were on all
8 kinds of subjects."

9 MR. RANSOM: But as you noted, that may or may not
10 occur.

11 THE COURT: Okay. Thank you.

12 MR. RANSOM: The other aspect of that, Your Honor,
13 is that a FISA order is in many ways like a warrant. It's
14 not a warrant but it's in many ways like a warrant, and it
15 should be treated like a warrant in regard to a return of
16 items or objects that were obtained during the search. In
17 other words, there should be a listing of everything that
18 was obtained which should be made available to the defendant
19 to review, just as he would be able to if it were in fact a
20 search warrant.

21 THE COURT: That might well be true in the sense
22 that if you and I were writing the statute, that should be
23 what happens, but is that what the law says about returns of
24 these sort of warrants?

25 MR. RANSOM: Well, that would be only under Rule

1 41. But I don't think it speaks to that issue. I'm
2 suggesting that it should be treated just as if it were a
3 warrant and should be treated in the same way, requiring
4 that there be a return identifying the objects that are
5 seized.

6 THE COURT: You're suggesting that the principles
7 that gave us Rule 41 ought to be applied here even if Rule
8 41 doesn't apply?

9 MR. RANSOM: Correct, that's what I'm saying.

10 THE COURT: All right. Thank you.

11 MR. RANSOM: Your Honor, if I can move to No. 7.
12 This is the one where we ask for them to provide evidence of
13 their theory of "at peace," which is required in Section
14 956(b) .

15 In their response, the government says that it
16 will not proceed under 956(b); therefore at this time I
17 would like to make an oral motion to have that stricken from
18 the indictment.

19 THE COURT: To the degree the indictment reflects
20 that theory?

21 MR. RANSOM: Yes.

22 THE COURT: The "at peace" theory?

23 MR. RANSOM: Yes.

24 THE COURT: Mr. Knight, any response to that
25 specific point?

1 MR. KNIGHT: The government would object at this
2 point in time to the Court formally striking it from the
3 indictment. I believe the government has the authority to
4 elect a theory, and it has done so. However, since we've
5 obtained no discovery from the defense at this stage, I
6 think it would be irresponsible of the government to fully
7 commit, other than what we've committed to in the briefs, to
8 strike from the indictment that language. We've articulated
9 what our position is with respect to the statute, but I'd
10 ask the Court not grant the motion at this time. Certainly
11 it's something we can revisit as we move toward trial.

12 THE COURT: All right. I'll think about that.
13 Certainly the operating position right now is that whatever
14 happens with striking or not, the government has committed
15 to this course of action, and that's not alterable at this
16 point, absent intervening circumstances. But if we just
17 move forward with the government putting on its case, then
18 I'm not going to allow them to change their mind down the
19 line and move to an "at peace" theory later. You can sort
20 of take that to the bank at this point.

21 MR. RANSOM: Thank you, Your Honor.

22 Your Honor, on No. 18, the indictment in this case
23 alleges that there was a bombing on May 27th, 2009, and Ali
24 Jaleel was the suicide bomber. There has never been
25 presented one scintilla of evidence from the bomb site

1 itself that would identify Ali Jaleel as the suicide bomber.
2 The FBI was present at the scene at some point in time.
3 We've not been provided with any reports from the FBI
4 regarding what, if any, materials it obtained from Pakistani
5 authorities or the authorities of the city wherein the
6 bombing occurred, stating that they had no relationship with
7 Pakistan and could not compel such documents.

8 Now, the FBI agent did say, in a document that we
9 have possessed, given to us by the government, that he
10 attended several days of meetings regarding the bombing and
11 the material used in the bombing. We've received no reports
12 whatsoever of any of the meetings that the FBI agent
13 attended, and we all know the FBI well enough to know that
14 if an agent attended a meeting, there is a 302 regarding it.

15 The agent also provided what he calls a timeline.
16 And it says, "Timeline (per police reporting)," and then he
17 sets forward basically six aspects of what occurred during
18 the bombing, the suicide bombing.

19 Again, that would certainly indicate, if it were
20 per police reporting, that he had seen police reports. We
21 have none of those.

22 This is one of the most crucial aspects of the
23 case, what occurred during the bombing that would identify
24 Ali Jaleel as the suicide bomber. And we should be entitled
25 to all evidence, all reports, all documents pertaining to

1 that. We have virtually none.

2 THE COURT: "Virtually" means just what you read
3 me is all you have?

4 MR. RANSOM: We have a report of the agent who was
5 given parts of the bomb to send back to a laboratory in
6 Virginia for analysis by the United States and then returned
7 to Pakistan. Pakistan at this point in time had virtually
8 no laboratory adequate to do that kind of investigation. So
9 the agent was given those pieces. There are photographs of
10 pieces. There are no fingerprints on those pieces, but
11 that's all he had at that point in time regarding the
12 bombing.

13 THE COURT: That was photographs of the bomb
14 pieces plus some kind of report of the analysis?

15 MR. RANSOM: No, just the fact they were sent to
16 the United States; and yes, a report from the laboratory as
17 to what they were, and then they were returned.

18 THE COURT: All right.

19 MR. RANSOM: But the reason it is even more
20 important is we have newspaper articles at the time of the
21 bombing that come from Pakistan, in which they say persons
22 were arrested who were involved in the bombing; persons who
23 were involved in the bombing were Indian; six persons were
24 arrested, one person was killed. So there are all these
25 newspaper reports that suggest that there were other persons

1 involved in the bombing and not this person, Ali Jaleel.
2 That's why reports from there are so important. But, again,
3 we have nothing and we have no way of getting anything
4 except through the government.

5 So we would ask that they be compelled to obtain
6 such information, Your Honor, if they do not presently have
7 it.

8 I'd also like to look at No. 29. What we're
9 asking for is co-conspirator statements. And we may address
10 this later, but the response that the government gives is
11 that they will identify the co-conspirator statements they
12 intend to use in their trial memorandum. That's also said
13 in No. 31.

14 The problem is there are 37,000 pages of
15 documents. We have no idea who the alleged co-conspirators
16 are, because in the indictment itself, it says that Ali
17 Jaleel is an unindicted co-conspirator, but there are
18 other -- as you know, the usual language, there are other
19 conspirators known and unknown to the grand jury, but no
20 further identification. And there is nothing in the
21 discovery that's been provided that identifies who the
22 co-conspirators are.

23 And this, of course, is important as a time
24 mechanism for the Court, because at some point we're going
25 to end up in an 801 argument about what is admissible, what

1 is not, who is a conspirator, who is not a conspirator, was
2 this was made during the course of the conspiracy, was it
3 not. And it is important at this juncture we have an
4 identification of those matters so that we can make the
5 matter easier for the Court when we proceed, as well as
6 easier for ourselves in what to investigate and who to
7 investigate and how to investigate. We would ask that that
8 be compelled also, Your Honor.

9 THE COURT: Anything further?

10 MR. RANSOM: No, Your Honor.

11 THE COURT: I don't need to hear from you on the
12 motion to strike the indictment, but there are those three
13 other issues, defendant's statements, what's called No. 18
14 and what's called No. 29/31.

15 Let's start with defendant's own statements.

16 MR. KNIGHT: Thank you, Your Honor.

17 And I identified three separate arguments
18 Mr. Ransom made in support of his position that the
19 government should be providing all of the defendant's
20 statements.

21 The first argument I heard was that the documents
22 or the email statements of the defendant are indeed
23 documents as that phrase is understood under Rule
24 16(a) (E) (iii) of the Rules of Criminal Procedure.

25 To my understanding, this is a new argument not in

1 the briefing and not one supported by any law. I think a
2 reading of the statute itself would suggest that documents,
3 as in a tangible item, is something that is indeed different
4 from a recorded statement of the defendant, which we are
5 interpreting an email in this case to be, which is under
6 16(a)(1), and has attendant to it a requirement that the
7 statement be indeed relevant.

8 I think the fact that the rule itself
9 distinguishes between tangible documents and relevant
10 statements supports our plain reading of the rule, which is
11 an email does indeed need to be relevant to be discoverable
12 under Rule 16, and that the notion that any recorded
13 statement of the defendant in the form of an email is per se
14 a document defies common sense and certainly the other rules
15 of discovery.

16 So that's --

17 THE COURT: I don't know why it defies common
18 sense. I have two choices: Is an email more like a written
19 paper document or more like a recorded phone call basically,
20 right? Those are my two choices.

21 MR. KNIGHT: Yes.

22 THE COURT: So why does it defy common sense to
23 say it's more like a written paper document than recording
24 somebody's phone calls? You type it.

25 MR. KNIGHT: You do, but it's been treated, at

1 least insofar as the law as it relates to surveillance, as
2 the type of item that is managed, seized and discovered
3 under the rules of electronic surveillance. So in that
4 sense, we believe it is more akin to that.

5 Second, the argument that it defies common sense
6 speaks more to the fact that the other laws of discovery, of
7 course, speak to relevance and materiality as being the
8 touchstone of providing documents and materials. There's no
9 criminal case that I'm aware of --

10 THE COURT: You mean relevance and materiality are
11 the touchstone for non-documents and non-materials, right?
12 I mean, if you --

13 MR. KNIGHT: Well --

14 THE COURT: Rule 16 suggests that if you take
15 documents from a defendant, then you've got to tell him
16 about all the documents you took, absent an inquiry into
17 relevance, right?

18 MR. KNIGHT: Yes, but I think that contemplates
19 physical documents. That's precisely the point. I think
20 the history behind the rule is to protect the scenario where
21 documents are physically seized from an individual, and to
22 ensure that some notice is provided, and the defense knows
23 and has the ability to use the items that are taken from the
24 defendant in discovery. But the fact --

25 THE COURT: That privilege isn't really as much a

1 Rule 41 concept as a Rule 16 concept, isn't it? Everything
2 you physically take from the home, in some manner or another
3 you have to account for it to the person that you took it
4 from.

5 MR. KNIGHT: It is. I suppose that gets back to
6 Mr. Ransom's argument that the Court should be applying a
7 Rule 41 analysis in analyzing whether a full return of the
8 emails would be appropriate. And our position is that it
9 should not.

10 But I think it's fair to say there's no
11 controlling legal authority that has held that an
12 electronically obtained communication is somehow
13 qualitatively different from a recorded statement of the
14 defendant under Rule 16(a)(1), and therefore the government
15 is required to provide all recorded statements. And that
16 is, as I understand it, what the argument is. So the
17 government's argument is twofold.

18 THE COURT: Is there case law specifically on that
19 under Title III?

20 MR. KNIGHT: I don't know, Your Honor.

21 THE COURT: The prevailing practice under Title
22 III is what is or is not the identification of every
23 recorded statement absent any inquiry into relevance and
24 materiality?

25 MR. KNIGHT: Well, in theory, though, you can have

1 recorded statements that relate to a different investigation
2 that would not be turned over in discovery in the primary
3 case. I mean, that again gets back to the argument that
4 this interpretation of Rule 16 is not consistent with the
5 practice of criminal discovery, in that if discovery is
6 being provided, it is relevant because it is relevant to the
7 underlying charge, but if hypothetically a defendant is
8 under investigation for something else, the government
9 wouldn't be required under Rule 16 to turn that over as
10 well, which certainly this interpretation of the rule would
11 require.

12 THE COURT: So that's your argument on Rule 16. I
13 think you've pretty much hit on what you want to say on Rule
14 41, then, the same idea, that you don't think that principle
15 applies here?

16 MR. KNIGHT: Not only does the principle not apply
17 but there's already a statutory scheme in place, to the
18 extent items are obtained under the Foreign Intelligence
19 Surveillance Act, there is a process not only to challenge
20 but that governs the government's use and disclosure of that
21 material.

22 THE COURT: Specifically under Rule 41?

23 MR. KNIGHT: Well, as it relates to FISA, but
24 that's what distinguishes it from the Rule 41 requirement.

25 THE COURT: The third argument is a relevance

1 argument that in some fundamental way in the posture of this
2 case there's at least one hypothetical defense that would
3 make it helpful to the defense, if we use that definition of
4 relevance, to have every innocent email there is in order to
5 make the defense that the picked inculpatory emails need to
6 be read in the context of a much weightier volume of
7 innocent emails.

8 MR. KNIGHT: Yes. And I think really there are
9 two problems with that argument. I mean, the one is
10 factually, I don't think that squares with the type of
11 charge in this case. In other words, what has been alleged
12 in this case is a conspiracy that ultimately leads to a
13 narrowing confined active material support related to a
14 specific incident.

15 What dovetails with that is the case law, which
16 does not support Mr. Ransom's position. Courts have held --
17 and I think the best case for this is in the Second Circuit
18 in a case called *Gambino*, which deals specifically with
19 whether or not evidence or information the government has in
20 its possession of non-criminal activity is relevant for
21 underlying criminal charge. And that court and other courts
22 have held that it's not. It's simply volume of material
23 related to not engaging in physical activity is not
24 probative of an underlying -- of the criminal case and the
25 criminal charge in the underlying criminal case.

1 And I think the final point on that is what the
2 Court alluded to, which is if that indeed is the defense, no
3 one is in a better position to put that on than the
4 defendant himself, and he can do that even without
5 testifying. And this typically happens, to the extent a
6 court admits it at trial, and that is through the
7 presentation of character evidence or investigation or any
8 other kind of evidence of what the defendant may have
9 engaged in during an alleged time period that was not
10 criminal.

11 And a final point I'll make on this, because I
12 think it is relevant for the Court's consideration of this
13 argument, and that is the government did ensure in its
14 review of discovery and was cognizant of the fact that a
15 statement hypothetically that the defendant made repudiating
16 this sort of conduct or violence or anything of that nature,
17 the government interpreted it to be something it would have
18 to disclose if they indeed discovered that.

19 So we're not suggesting that we weren't aware of
20 statements that didn't relate to the conspiracy itself. We
21 were cognizant of the need to watch out for that certain
22 behavior. So I think it's not supported by law, the
23 government complied with its obligations, and there are
24 other ways he can present this defense.

25 THE COURT: On this last point, if it becomes

1 necessary -- just sort of thinking out loud here -- is it
2 going to be possible in this case for the jury to learn even
3 without the defendant's own testimony that of the X number
4 of emails the government is relying on, those occur as a
5 fraction of a larger number of all the emails, and the jury
6 could learn what that percentage was?

7 MR. KNIGHT: In this stage, I don't know the
8 answer to that, Your Honor, because it relates to
9 information that is at this point in all likelihood
10 classified about the scope of the investigation. However, I
11 can foresee a situation where the defendant certainly wants
12 to make that argument and the government may propose to the
13 Court a number of solutions that may relate to a stipulation
14 about the investigation or the scope of this investigation
15 so that that argument could be made in front of the jury
16 about what the Government did and what it ultimately
17 obtained.

18 THE COURT: Let's turn to No. 18, then. And I
19 hear Mr. Ransom really making two arguments there. One is
20 that you ought to have disclosed every shred of evidence
21 that gets at whether Ali Jaleel really died at the scene or
22 not. And I should say that you ought to disclose every
23 shred of evidence you have.

24 And then the second is that you ought to be -- if
25 the answer to that is already done, we've already done that,

1 then you ought to be tasked with your best efforts to obtain
2 what's out there that hasn't already been obtained.

3 Could you respond to those two positions?

4 MR. KNIGHT: Certainly. And the second argument I
5 think speaks to the larger issue with this area of discovery
6 in this request, and that is this: it is important I think
7 again to point out that the bombing itself took place on
8 foreign soil. It did not involve the death of any American
9 citizen. The United States government was not investigating
10 this act, as it did not again relate to any of its citizens.

11 The material that the government has provided in
12 discovery, it has because, as luck would have it, an FBI
13 bomb technician was at that point in time, during the point
14 in time of the bombing, assigned in Pakistan and provided
15 assistance to the Pakistani government in investigating the
16 bombing. And to that end, the government has provided
17 everything it has about what that agent did in
18 discovery: the testing assistance he provided, a PowerPoint
19 he produced about what he learned at the scene itself, and
20 even some internal communications that Mr. Ransom read from
21 that may arguably be *Jencks* material that go to that. And
22 that speaks to something he said, which is the FBI must have
23 written the report.

24 Again, this was not an FBI investigation, so the
25 FBI did not go to a -- a site on foreign soil and conduct a

1 fulsome investigation when it did not involve a U.S.
2 citizen. So we have given what we have in the FBI's
3 possession.

4 THE COURT: So your short answer to the idea there
5 must be a report written by the FBI is that you haven't
6 disclosed yet is that you denied that?

7 MR. KNIGHT: That's correct.

8 THE COURT: And to the idea that the agent there
9 referenced her "police reporting," which presumably, since
10 it's the word "police" would mean Pakistani police, what's
11 your position on whether you have that and it should be
12 disclosed?

13 MR. KNIGHT: Well, we don't have it, and if we
14 did, we'd turn it over. I think the point there -- and
15 we've said this separately in pleadings before the Court --
16 that the government has formally requested this information
17 from the Pakistani government related to the bombing itself
18 and the information that it may have relating to Mr. Jaleel
19 and the bombing. We do not have that, which sort of speaks
20 to Mr. Ransom's point that the government should be
21 compelled to obtain.

22 We are attempting to obtain that material. We
23 simply don't have it. So I think those police reports that
24 are alluded to in the PowerPoint are indeed documentation in
25 possession of the Pakistani authorities that we would like

1 to have, too.

2 But this is underscored by the fact that the FBI
3 was not part of the team investigating this, and the
4 Pakistani government is not part of the investigative or
5 prosecution team. And that's why we don't have this
6 information.

7 THE COURT: Let's turn to 29 and 31, the
8 co-conspirator statements.

9 MR. KNIGHT: Certainly, Your Honor.

10 THE COURT: Is it correct that your current
11 position is that at some time around the production of
12 witness statements, that's when you intend to identify the
13 co-conspirator statements you're relying on, who made them
14 and what they are?

15 MR. KNIGHT: No, because that frankly sounds more
16 cagey than it is. I mean, our theory of the case and the
17 statements upon which we're going to rely at trial are
18 pretty well set out in the search warrant affidavit. We
19 have not walked through the evidence and what rules of
20 evidence will be relied upon to offer those statements, but
21 it's not as if there is some great unknown hiding in the
22 discovery that we have withheld from prior factual
23 recitations about this case.

24 I mean, I think it is fair to say that Mr. Jaleel
25 was a known deceased unindicted co-conspirator, and there

1 are many unknown in this case, given the way it unfolded,
2 the information we have and the description of the act
3 itself. So --

4 THE COURT: You're offering co-conspirator
5 statements. I mean, you say "many unknown," meaning that it
6 may be possible that you'll try to offer co-conspirator
7 statements from unknown people?

8 MR. KNIGHT: No. I'm saying that there are many
9 co-conspirators who as individuals are unknown, but to the
10 extent we're offering co-conspirator statements, they are
11 from individuals who are pretty well identified in the
12 principal part of the discovery. I mean, Mr. Jaleel, chief
13 among them, again, is deceased and unindicted, obviously,
14 but he would be an individual --

15 THE COURT: We all, I think, understand that some
16 day you'll want to offer statements by Mr. Jaleel, and
17 then -- so at some point also you'll need, in order for us
18 to litigate the 801 issue, you'll need to identify which
19 statements you're going to put on at trial. It's one thing
20 to give them in discovery and another to put them on at
21 trial and who made them.

22 And when will that happen?

23 MR. KNIGHT: As we stated in here, I think our
24 expectation is in our trial memorandum when the parties
25 typically identify evidentiary issues for the Court, we'll

1 set forth our full theory of the case as we expect it to
2 unfold at trial, and we'll identify which statements of
3 Mr. Jaleel or perhaps Mr. Jaleel's wife we would offer at
4 trial as co-conspirator statements, and ask the Court for a
5 ruling and explain our reasons for offering them.

6 THE COURT: Remind me how far in advance of trial
7 the pretrial conference is.

8 MR. KNIGHT: I believe it's February 9th. It's
9 roughly two months is my memory.

10 THE COURT: Ms. Stephens, can you help us with
11 that?

12 MR. GORDER: Your Honor, the trial memos are due
13 February 9th. The pretrial conference is March 20th.

14 THE COURT: The trial is what day again?

15 MR. GORDER: April 13th.

16 THE COURT: All right. Thank you.

17 Mr. Ransom, do you wish to be heard by way of
18 reply to that?

19 MR. RANSOM: Just a couple things, Your Honor. We
20 all talk about Ali Jaleel as if he were dead. There is no
21 evidence that he is dead.

22 We tried to get emails from the providers
23 ourselves, as the Court may know, because --

24 THE COURT: Let's just pause there for a moment,
25 then. So in -- that's relevant for a variety of reasons,

1 but if we're talking about co-conspirator statements, then
2 there's, I suppose, an issue of availability and
3 unavailability, and that just works to your advantage if
4 it's ever on the government's side of the ledger to prove
5 unavailability, right?

6 MR. RANSOM: Indeed.

7 THE COURT: All right. Thank you. Go ahead.

8 MR. RANSOM: And, Your Honor, here the government
9 has conceded there's no direct evidence that Mr. Khan
10 knowingly knew -- is that the proper way to say it? That
11 Mr. Khan knew that there would be a suicide bomber. So
12 that's why this information becomes so important.

13 THE COURT: Which information? That Mr. Jaleel is
14 dead at the scene?

15 MR. RANSOM: Yes. The bombing itself and what
16 took place.

17 THE COURT: I guess I have to say I'm about as
18 certain as I am of anything that the government has not yet
19 conceded that fact. I don't know why you think the
20 government has conceded that he didn't know there would be a
21 suicide bombing.

22 MR. RANSOM: That's what they said.

23 THE COURT: How? What words were said that --

24 MR. RANSOM: They said verbally to me and to
25 Ms. Matthews.

1 THE COURT: All right. In any event, even if
2 that's not true, it's still highly relevant evidence, isn't
3 it, for you? You don't need that to make this a centerpiece
4 fact of your defense.

5 MR. RANSOM: That's right.

6 THE COURT: Mr. Jaleel's death or not at the
7 scene.

8 MR. RANSOM: Well, yes, we do because that is the
9 bombing alleged in the indictment, the suicide bombing.

10 THE COURT: Right. But I mean even if the
11 government's theory is he did know there would be a suicide
12 bombing, if Mr. Jaleel wasn't the suicide bomber, that goes
13 a long way towards helping your case, doesn't it?

14 MR. RANSOM: That's true. That's what we want to
15 know, Your Honor. Thank you.

16 THE COURT: All right.

17 All right. Thank you all. I'm going to think
18 about this a bit here, and I'll get back to you with an
19 answer within a few days. I don't believe at this point I'm
20 going to require any further briefing of any kind.

21 I will -- I am going to ask the United States to
22 think a little more thoroughly about this "at peace" issue,
23 what's your position on it and what you're going to do. So
24 I don't require an answer right now, but I invite you within
25 a few days to just clarify by email to counsel and

1 Ms. Stephens whether you have further thoughts of what
2 you're going to do about the position you've staked out on
3 the "at peace" issue. Fair enough?

4 MR. KNIGHT: Your Honor, I typically can't modify
5 an indictment in a terrorism case without the approval of
6 about 20 to 30 people, so I didn't want to do that before
7 the Court.

8 THE COURT: I understand.

9 All right. Thank you all. We'll be in recess.

10 MS. BAGGIO: Your Honor?

11 THE COURT: Yes.

12 MS. BAGGIO: I wanted to bring up one more thing,
13 Your Honor.

14 THE COURT: Absolutely.

15 MS. BAGGIO: I had asked for permission to have a
16 one-week extension on the filing of round three motions that
17 took it from last Monday to this coming Monday.

18 THE COURT: You want a little more time than that
19 in light of what we talked about today and no answer from
20 me?

21 MS. BAGGIO: That's my concern, Your Honor.

22 THE COURT: I think that will work.

23 MS. BAGGIO: Okay. So what would --

24 THE COURT: Why don't we do this. Why don't we
25 float it off the date I give you an answer. When you get an

1 answer from me, how much time will you need at that point?

2 MS. BAGGIO: Well, we -- would two weeks be fair,
3 Your Honor?

4 THE COURT: Yes.

5 MS. BAGGIO: Okay. Thank you.

6 THE COURT: So that will come due two weeks after
7 I issue my rulings on the two -- the two basic umbrella
8 motions that I have in front of me today.

9 Thank you all. We'll be in recess.

10 THE CLERK: This court is adjourned.

11 (Proceedings concluded.)
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

10/17/2014

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE